STATE OF MICHIGAN

COURT OF APPEALS

BLOOMFIELD ESTATES IMPROVEMENT ASSOCIATION, INC.,	UNPUBLISHED March 14, 2006
Plaintiff-Appellant,	
v	No. 255340 Oakland Circuit Court
CITY OF BIRMINGHAM,	LC No. 2004-056387-CH
Defendant-Appellee.	

Before: Donofrio, P.J., and Borrello and Davis, JJ.

BORRELLO, J. (*dissenting*).

I respectfully dissent from my brother jurists' opinion in this matter for the reason that plaintiff is barred by the doctrine of laches from bringing suit to enforce the Association's restrictive building covenant.

While restrictive covenants are enforceable in general, sometimes enforcement would not be fair to the violating party. It would appear inequitable to allow someone who knew that defendant was in the wrong in engaging in construction or a particular use, but did nothing for a time and allowed defendant's expenses to mount before instituting suit. 25 ALR 5th 233 (1994). That is exactly what plaintiff did in this case.

There are three equitable exceptions to the general enforcement rule: (1) technical violations and absence of substantial injury, (2) changed conditions, and (3) limitations and laches. *Rofe v Robinson (On Second Remand)*, 126 Mich App 151, 157; 336 NW2d 778 (1983). Defendant contends, and I would hold, that the third exception applies to the facts of this case.

It is not contested that defendant and their predecessors in interest have used this parcel of land as a park for over seventy-five years. And while my brother jurists readily acknowledge this fact, they rely on *Boston-Edison Protective Ass'n v Goodlove*, 248 Mich 625, 227 NW 772 (1929) to stand for the proposition that even though plaintiff failed to object to a continuous breach of seventy-five years to the restrictive building covenants, plaintiff still retains a right to challenge another breach to the restrictive covenant. The majority's reliance on *Boston-Edison, supra*, is misplaced and thereby causes them to render the wrong decision in this case.

Boston-Edison dealt with a 1920's neighborhood in Detroit, Michigan. Plaintiffs had enacted restrictive building covenants similar to the ones cited in this case. Defendant was a

physician who operated an office out of his home. Plaintiffs did not object to such use, however, when the defendant attempted to build a one-story office building in the rear of his residence, which was slated to contain an x-ray room, medical library, waiting room, and doctor's office, plaintiff's did object. Our Supreme Court ruled in pertinent part:

> While it is true that there has been no objection made to the defendant's practicing medicine at his home and using it as a doctor's office . . . the defendant should not be able to violate further rights of plaintiffs on account of his heretofore *slight* breach of the restrictive covenants in his deed. Plaintiffs are not estopped from preventing a most flagrant violation of the restriction on account of their theretofore failure to stop a *slight* deviation from the strict letter of such restrictions. 248 Mich at 629. (Emphasis added).

Obviously the facts of *Boston-Edison* and the case before us are so incongruous as to preclude adoption of *Boston-Edison* as any type of precedent for this case. Here, defendant did not engage in a slight variation of the restrictive building covenant. Seventy-five years ago, defendant made a parcel of land, which was subject to the restrictive building covenant, into a park. For seventy-five years it has been used as a park. While the majority contends that when defendants turn the park property into a dog park " . . . common sense and everyday experience suggests [it] will generate more predictable noise and traffic than merely being a component of a larger park . . . " it would seem that common sense would also suggest that while it has been a park for the past seventy-five years, people have brought their dogs to this park. Thus, I cannot accept the majority's contention that when defendants make this parcel of land, which has been used as a public park for seventy-five years, into a "dog park" that by such action defendant has committed a "more serious violation of the deed restrictions for residential use." Because this parcel of land has been used by people and dogs for over seventy-five years, and because defendants had a reasonable right to rely on the acquiescence of plaintiff in objecting to such a use and have made expenditures to turn the parcel into a "dog park", I respectfully dissent.

/s/ Stephen L. Borrello